IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 20, 2007

STATE OF TENNESSEE v. REX AARON NELSON, ALIAS

Appeal from the Criminal Court for Knox County
No. 80826 Richard R. Baumgartner, Judge

No. E2006-01333-CCA-R3-CD - Filed May 3, 2007

The Defendant, Rex Aaron Nelson, alias, was indicted by a Knox County grand jury for first degree murder in the shooting death of William Arthur Nichols. Following a jury trial, the Defendant was convicted of voluntary manslaughter and sentenced as a Range I, standard offender to six years in the Department of Correction. On appeal, the Defendant argues that (1) the evidence was insufficient to support his conviction beyond a reasonable doubt, (2) the trial court erred in imposing the maximum sentence within the applicable range, and (3) the trial court erred in ordering the Defendant to serve his sentence in total confinement. We conclude that the evidence is sufficient to support the conviction for voluntary manslaughter beyond a reasonable doubt. However, we conclude that the trial court erred by sentencing the Defendant pursuant to the 2005 amendments to our sentencing law because the Defendant's crime was committed before the amendments were enacted. Therefore, we remand this case for resentencing under the 1989 Sentencing Act with consideration of the Sixth Amendment constitutional limitations upon enhancing the Defendant's sentence above the presumptive minimum.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part; Remanded

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and ALAN E. GLENN, JJ., joined.

Thomas G. Slaughter, Knoxville, Tennessee, for the appellant, Rex Aaron Nelson, Alias.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; Randall E. Nichols, District Attorney General, for the appellee, State of Tennessee.

OPINION

This case arises from the shooting death of William Arthur Nichols, which occurred on the Defendant's property in the late afternoon of November 6, 2004, in Knox County. While the facts leading up to the shooting are not entirely clear, the Defendant and the victim apparently had been drinking throughout the day and got into an argument regarding the victim's dog running unleashed in the neighborhood. Although no witnesses were present at the time of the shooting, the Defendant stated that he was trying to make the victim leave his property and was following him with a loaded and cocked shotgun pointed at the victim's back. The Defendant stated that the shotgun accidentally fired, shooting the victim in the back at close range.

Officer Brad Cox of the Knox County Sheriff's Department testified at trial that he was called to the scene of the shooting at 3333 Swafford Road. Officer Cox stated that he observed the Defendant "standing next to a white pickup truck." The Defendant said that "he didn't mean to shoot [the victim]." The officer also saw the victim "laying on the ground" with a "gunshot [wound] in the back" and a shotgun "laying next to the passenger side door of the pickup truck." He stated that he inspected the shotgun and found a "spent shotgun casing" inside the gun.

Officer Cox testified that, as a result of his investigation, he determined that the Defendant was the sole suspect in the shooting. After advising the Defendant of his Miranda rights, Officer Cox asked him what occurred, and the Defendant again responded that "he did not mean to shoot him." Officer Cox stated that the Defendant was "agitated, upset[,]" and crying while he spoke to him. He also testified that, during the investigation, he became aware that the Defendant had reported the incident to his neighbors, the McFarlands, to have them call 911.

Detective Larry G. Moore of the Knox County Sheriff's Office also testified at trial. Detective Moore stated that he also observed the "wound on the left rear side of [the victim's] back" that had apparently been inflicted by a "shotgun[.]" He also noticed two stab wounds on the victim's legs. Detective Moore asked the Defendant if he had cut the victim, and the Defendant replied that "he didn't know" and that he had "just poked at him." The Defendant also stated that he was unsure "whether he actually cut [the victim] or not" but that he "didn't believe he did." Detective Moore testified that the investigating officers recovered one fillet knife that was "down in the woods next to a tarp and a pile of . . . wood." Detective Moore stated that this knife was apparently the knife the Defendant used to inflict the stab wounds on the victim's legs, because the Defendant told him he had thrown the fillet knife he used into the wooded area. Detective Moore also testified that Ms. McFarland, the Defendant's neighbor, said that the Defendant came to their home, told them he "shot [his] buddy" and requested her to call 911.

Dr. Darinka Mileusnic Polchan of the Department of Pathology at the University of Tennessee also testified on behalf of the State. According to her autopsy report, the victim died from a "shotgun wound of the back." Dr. Polchan determined that the shotgun was fired from "less than three feet" from the victim's body. The victim also had two "very unusual" stab wounds—one on

each leg. The victim had a blood alcohol level of ".19 grams percent" and a urine alcohol level of ".26 grams percent."

Following the State's proof, the Defendant testified on his own behalf. The Defendant stated that, on the morning of November 6, 2004, the victim came to his mobile home to visit. The Defendant testified that the victim brought with him "two tall . . . quart cans of beer." The Defendant stated that the victim began drinking but that he himself did not drink because he had "some wood to haul" later that morning. At around noon, the Defendant drove, and the victim rode with him to pick up the wood. During the trip, the Defendant stopped at a gas station, and the victim bought a "box" of eighteen beers. The victim continued drinking, and the Defendant drove to the site to pick up the firewood.

According to the Defendant, when he and the victim arrived at the residence to pick up the wood, the victim "was just throwing the wood [into the truck] any old way." The Defendant told the victim to "stop" because he "'need[ed] to stack it on right . . . so [the Defendant] could get a big load.'" The Defendant told the victim to "[j]ust sit over and drink beer." The victim did so, and the Defendant "finished loading up the truck and the trailer."

The Defendant testified that he and the victim then returned to his mobile home. The Defendant then described the events leading up to the shooting as follows:

> We got back to the house, and I pulled in the lower side to where there's a . . . little cleared-off spot down below my trailer there. . . . I started unloading the wood off the truck. And [the victim] said, "I'm going to go up here and let my dog loose." I said, "Okay." Or he said he was going to go up and do something with his dog. Let it loose or check on it, whatever. So he leaves from where we were unloading the wood and goes up to the trailer. He had tied the dog to the tongue of the trailer when we left. And I had set it a bowl of water out. I have a bowl with a dog chain on it at the other end of the trailer, but for some reason, he didn't hook it up to that. He hooked it up to the tongue of the trailer.
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> Anyway, . . . after I unloaded the wood out of the truck, I said, "Well, I don't have to unload the trailer. I'll just unhook the trailer." So I unhooked the trailer. And [the victim is] up here doing something. I don't know. You know, it didn't matter. I pulled the truck up there to the house, and I said, "Would you like some beans . . . to eat?" You know, I said, "I'll fix us something to eat. You know, some beans and some cornbread fritters and fried potatoes or something like that." Something I could make on my stove.
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> So I start that. I had had three beers that day. . . . [T]he first when we got there at the wood, one when I was driving home, and one when I was unloading the wood down at the house.

I had—that's what I had had to drink that day. Anyway, I had gotten another beer and opened it up and set it out there, I believe, . . . but I started to wash some potatoes. I had had the beans on the stove. I was washing the potatoes off. I had seen [the victim] go up the road, and he hadn't—his dog was running loose, and I had asked him to get it because the neighbors have rabbits and chickens and what not. Says, it'll get over there in their stuff. And I had run one of the other neighbors' dogs off. I told him, I said, "You need to get it, you know, put it up . . . ." [H]e says, "Okay." So he goes out to get the dog, and I go in to fix . . . food then.

After a little bit, I had come back out to stir the beans on the stove, and I noticed [the victim] go walking up the road, way on the other end of the property, up out of sight. And I thought, "Well, he's not getting his dog there." So I went back inside and I said, "I'll get the dog up here." I grabbed my shotgun, and I pointed it down there toward the wood, and I fired a shot. The dog stopped running around, looked up at me, and I patted my leg and whistled. And the dog came up to the house—or was headed up to the house. And I put—I got my shotgun—I throwed [sic] the hull out of the shotgun, walked toward the front door. There—I had shells just inside the door. I reached down and grabbed a shell and put [one] in the shotgun, closed it, and set it right back inside the door, and after 30 minutes or so, I was still fixing [the] meal.

After about 30 minutes, I seen [the victim] coming back down the road. And I thought, "Well, that's okay." I went on with that. I was over doing some dishes or something at the sink when [the victim] came in the house, throwing his arms around and raising hell, and I couldn't really make out what he was saying. He was speaking English, but it was bits and pieces of cuss words. I can't tell what he was saying. He . . . was out of his head. He had never been like that. And I said," . . . [W]hat the hell are you doing?" And I said, "Well, if you're going to be like that," I said, "hell, you can just leave and take your dog with you."

When I walked over toward him, we kind of got into a little scuffle. And somehow he got my head, my shoulders or something was down. And when I was down, I come up and I pushed him back like that, and pushed him away from me. And he staggered backwards and fell into a chair, and it looked like he just went over and set down in the chair.

And I turned around, and on the kitchen table there was a knife. I grabbed the knife, and he was still in the chair. And I reached over and—at the door, grabbed the shotgun and pointed it down like that and says," . . . [G]et the hell out." And I walked up toward him, and he started kicking. So I poked at him with the knife and backed up and cocked the shotgun. And I said, "Get out. Get out of my house. Leave. Get in your truck and go." I don't know what all I said. I was—I know I told

him to leave, to get out. So I backed—he was kicking, and that's when I poked at him with the knife. . . .

. . . .

I was just poking at him as I was getting—going back away from him, and I swung—I had the shotgun, and I swung the shotgun and hit him across the shins, where he was kicking at me. And his legs went down and then I swung again. I either hit him right back behind the knee or close to the waist. And that's when I backed up and was . . . cussing [at him] to get out of my house, to leave. And that's when . . . I cocked the shotgun and pointed it at him, and he finally got up out of the chair and walked out like he was . . . just going to leave. Like everything was fine, and I was following at him and he was mumbling. I said, "Leave. Go on. Just go on. Leave." And we made it around to his truck, and I was still following him, telling him to leave. And he stopped, and I don't know if he turned or his hand come [sic] back. Something bumped the shotgun. It went up in the air . . . and went off.

The Defendant testified that he did not recall pulling the trigger of the shotgun and that he did not have any intent to kill the victim. The Defendant testified that he did not believe the victim had any weapon, but that he was "acting crazy and trying to fight[,]" and that he had "never seen him . . . in any way like that before." The Defendant stated that he "just wanted to show him the gun and get him to leave." The Defendant stated that he only cocked the shotgun because the victim "wasn't leaving" his trailer and that he wanted to "scare him into leaving."

After the victim had been shot, the Defendant testified that he "run [sic] as fast as [he] could" to his neighbors, the McFarlands, to have them call an ambulance. The Defendant stated that he told the McFarlands that he shot his friend "accidentally." After they had called 911, Mr. McFarland and the Defendant returned to the victim to attempt to render aid. The Defendant stated that they used towels to attempt to stop the bleeding and they covered the victim with a blanket so he wouldn't "go into shock."

When the Knox County Sheriff's officers arrived, the Defendant stated that he "didn't try to hide nothing" and "tried to tell them all what happened." He stated that he told the officers that he "didn't mean to shoot him."

Ms. Rosa Hodge, who resided at the house from which the Defendant and the victim picked up the wood on the afternoon of the shooting, also testified on the Defendant's behalf. She stated that she had known the Defendant for seven or eight years and that she had never known him to be argumentative or violent. Ms. Hodge also stated that, when the Defendant was drinking, he was "[h]appy go lucky."

Mr. Lloyd William Newcomb also testified on the Defendant's behalf. He stated that he had known the Defendant for approximately forty years. He also testified that the Defendant was "[h]appy go lucky" and "[a]lways [kept] me laughing." Mr. Newcomb stated that "everybody [the Defendant] met later became his friend." Mr. Newcomb testified that he had been around the Defendant while he was drinking and that he was a "happy drunk[.]"

Following a jury trial, the Defendant was convicted of voluntary manslaughter, a Class C felony. He was sentenced as a Range I, standard offender to six years in the Department of Correction. The Defendant filed a motion for a new trial, which was denied. This appeal followed.

Analysis

I. Sufficiency of the Evidence

The Defendant first alleges that the evidence is insufficient to support his conviction of voluntary manslaughter beyond a reasonable doubt. In this case, the Defendant contends that the shooting was accidental and that he never "had a motive to want to kill the victim[.]" The State responds that the Defendant intentionally opened the shotgun's lever, loaded the gun, cocked the hammer, and pointed the gun at the unarmed victim and that these actions are sufficient to support a conviction beyond a reasonable doubt of voluntary manslaughter. We conclude that the evidence is sufficient to find the Defendant guilty of voluntary manslaughter beyond a reasonable doubt.

Tennessee Rule of Appellate Procedure 13(e) prescribes that "[f]indings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt." A convicted criminal defendant who challenges the sufficiency of the evidence on appeal bears the burden of demonstrating why the evidence is insufficient to support the verdict, because a verdict of guilt destroys the presumption of innocence and imposes a presumption of guilt. See State v. Evans, 108 S.W.3d 231, 237 (Tenn. 2003); State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000); State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). This Court must reject a convicted criminal defendant's challenge to the sufficiency of the evidence if, after considering the evidence in a light most favorable to the prosecution, we determine that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Hall, 8 S.W.3d 593, 599 (Tenn. 1999).

On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable and legitimate inferences which may be drawn therefrom. See Carruthers, 35 S.W.3d at 558; Hall, 8 S.W.3d at 599. A guilty verdict by the trier of fact accredits the testimony of the State's witnesses and resolves all conflicts in the evidence in favor of the prosecution's theory. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and this Court will not re-weigh or re-evaluate the evidence. See Evans, 108 S.W.3d at 236; Bland, 958 S.W.2d at 659. Nor will this Court substitute its own inferences drawn from circumstantial evidence for those drawn by the trier of fact. See Evans, 108 S.W.3d at 236-37; Carruthers, 35 S.W.3d at 557.

The offense of voluntary manslaughter is defined as "the intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211. The Defendant argues that his voluntary manslaughter conviction is not supported by sufficient evidence.

The Defendant and the victim had been arguing, and the Defendant had "poked at" the victim with a fillet knife. The Defendant shot the unarmed victim in the back at close range with a shotgun as the victim was attempting to retreat from the confrontation. It is apparent that the jury did not accredit the Defendant's statement that the shooting was accidental. The proof presented at trial supports the jury's finding that the Defendant knowingly killed the victim. We conclude that the evidence is sufficient to support the jury's verdict of guilty of voluntary manslaughter beyond a reasonable doubt.

II. Sentencing

Next, the Defendant challenges the trial court's calculation of the length of his sentence and the denial of alternative sentencing. The Defendant asserts that the trial court erred in imposing the maximum sentence in Range I—six years. The Defendant also alleges that he should have been granted an alternative sentence. The State responds that the trial court was within its discretion to sentence the Defendant to the maximum within the applicable range based upon its finding of three enhancement factors and no mitigating factors. The State also counters that the Defendant merited total confinement because he had "failed to complete previous, less restrictive measures of punishment, and total confinement is necessary to avoid depreciating the seriousness of the offense."

Although both the Defendant and the State focused on the trial court's factual determinations in applying the enhancement factors, we conclude that this case must be remanded to the trial court for resentencing under the 1989 Sentencing Act.

The Defendant committed the offense on November 6, 2004. Because the 2005 amendments to our sentencing law had not been enacted at the time of the offense, the Defendant should have been sentenced under the 1989 Sentencing Act unless he executed an ex post facto waiver, see 2005 Tenn. Pub. Acts ch. 353, § 18 (effective June 7, 2005). Our review of the record shows that the Defendant did not execute such a waiver. Therefore, the trial court erred by sentencing the Defendant "under the new sentencing act . . . ."[1]

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[1] The trial court explained its determination of the sentence length on the record as follows:

> Voluntary *manslaughter* is a class C felony. It carries a total range of punishment of three to 15 years. As a range I offender, which it's clear that [the Defendant] is, it's three to six years. So that's the parameters within which I have to sentence [the Defendant].
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> In doing that, *under the new sentencing act*, I am not compelled to mandate a particular sentence based on enhancing and mitigating factors, but those are advisory to the [c]court, and I think . . . those are good things to look at in determining what an appropriate sentence is in this case. The state urges, and I agree, that [the Defendant] has a previous history of prior criminal conduct in

(continued...)

As such, we conclude that this case should be remanded to the trial court and that the Defendant should be resentenced under the 1989 Sentencing Act without consideration of the 2005 amendments. We note that the trial court must also consider the constitutional limitations arising under Apprendi v. New Jersey, 530 U.S. 466, 490 (2000), Blakely v. Washington, 542 U.S. 296 (2004), Cunningham v. California, 127 S.Ct. 856 (2007), and Gomez v. Tennessee, 127 S.Ct. 1209 (2007) (vacating State v. Gomez, 163 S.W.3d 632 (Tenn. 2005)), in determining the length of the Defendant's sentence.

We also note that, in light of Gomez v. Tennessee, a panel of this Court has determined as follows:

> [W]e can now hold rather than merely speculate that Tennessee's pre-2005-revision sentencing law, which mandated an inertial, presumptive sentence, was "just as determinative as Washington's scheme [as denounced in Blakely]—because the sentence was fixed by statute in the absence of fact-finding not embraced in the jury's verdict—and just as mandatory, as well—because the judge was not authorized to depart from the presumptive sentence unless he or she found certain facts not embraced in the jury's verdict . . . ."

State v. Mark A. Schiefelbein, No. M2005-00166-CCA-R3-CD, 2007 Tenn. Crim. App. LEXIS 213, at *3 (Tenn. Crim. App., Nashville, Mar. 7, 2007) (order granting and disposing of petition to rehear).[2] Therefore, we remand this case for the trial court to determine the appropriate sentence under the 1989 Sentencing Act.

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[1](...continued)
addition to that necessary to establish the range, [which is an aggravating factor under Tennessee Code Annotated section 40-35-114(2),] and I would note that he has a dozen prior misdemeanor convictions, including three driving-under-the-influence convictions and a number of public intoxication convictions in his history. He has no felony convictions on his record.

[Tennessee Code Annotated section 40-35-114(9) allows for enhancement if] previous placement on probation has been unsuccessful with him, and that's true.

And lastly, [Tennessee Code Annotated section 40-35-114(10) allows for enhancement when the Defendant] employed a firearm in the commission of this offense [and that] is also a factor that I'm going to take into account.

. . . .

So having said all that, I think that based on the fact that there are aggravating circumstances here, the convictions, the use of the firearm, the prior release into the community, that the appropriate sentence is the maximum in the range, and that is six years as a range I, standard offender.

(emphasis added).

[2] Only the LEXIS citation is currently available.

Conclusion

Based upon the foregoing authorities and reasoning, we conclude that the evidence is sufficient to support the Defendant's conviction for voluntary manslaughter beyond a reasonable doubt. We vacate the sentence imposed by the trial court. We remand this case for resentencing under the 1989 Sentencing Act with consideration of the constitutional restrictions upon enhancing the Defendant's sentence above the presumptive minimum.

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DAVID H. WELLES, JUDGE